

Ridley (Migration) [2021] AATA 2213 (13 May 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Owen Stephen Ridley
CASE NUMBER:	2013380
HOME AFFAIRS REFERENCE(S):	BCC2020/1240168
MEMBER:	Jason Pennell
DATE:	13 May 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa.

Statement made on 13 May 2021 at 5.38pm

CATCHWORDS

MIGRATION – cancellation – Temporary Skill Shortage (Class GK) visa – Subclass 482 (Temporary Skill Shortage) – ground for cancellation – fact or circumstance no longer exist – secondary criteria – member of family unit – relationship with primary visa holder ceased – consideration of discretion – purpose of visa grant no longer exist – legal consequences of visa cancellation – well-being of current de-facto partner – extraordinary circumstances of the pandemic – decision under review set aside

1.

LEGISLATION

Migration Act 1958 (Cth), ss 48, 104, 116

Migration Regulations 1994 (Cth), r 2.12; Schedule 3, Criterion 3001; Schedule 8, Condition 8202

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision dated 25 August 2020 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa under s.116 of the *Migration Act 1958* (the Act).
3. The delegate cancelled the visa under s.116(1)(a) of the Act on the basis that the applicant no longer satisfies the secondary criteria for the grant of the Temporary Skilled Shortage (GK 482) visa and a circumstance which permitted the grant of the applicant's visa no longer exists. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
4. The applicant appeared in-person before the Tribunal on Wednesday 5 May 2021 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Ashlea McPhie (applicant's current de facto partner), Mr Russell McPhie (applicant's partner's father) and Mr Ryan McPhie (applicant's partner's brother). The applicant was represented at the hearing of this review.
5. For the following reasons, the Tribunal has concluded that the decision under review should be set aside, and substituted with a decision not to cancel the applicant's Temporary Skilled Shortage (Class GK) (Subclass 482) visa.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116(1)(a). If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.
7. *Migration History*
8. The applicant is a 28-year-old male from the United Kingdom. He first arrived in Australia on 22 February 2017 on a Working Holiday (TZ 417) visa. He was subsequently granted a further Working Holiday (TZ 417) visa and a Temporary Skilled Shortage (GK 482) visa as a dependant on Ms Jade Kathleen McGrath's associated GK 482 visa application¹.
9. Since arrival, the applicant has departed Australia on three occasions and has been onshore since 14 August 2019. The applicant is currently on a Bridging Visa E (WE 050) with attached visa conditions 8207 (no study or training) and 8506 (notify new address).² The applicant's movement details³ indicate that the applicant has previously travelled into and out of Australia as follows:
 - 22-02-17 Arrived in Australia on TZ 417 working holiday visa;
 - 22-03-18 Departed Australia on TZ 417 working holiday visa;
 - 12-04-18 Arrived in Australia on TZ 417 working holiday visa;
 - 16-11-18 Departed Australia on TZ 417 working holiday visa;
 - 05-12-18 Arrived in Australia on TZ 417 working holiday visa;

¹Department of Home Affairs - Integrated Client Services Environment (ICSE) records

²Department of Home Affairs - Movement Record dated 5 March 2021, AAT File No 2013380, Doc Id No: 8182316

³ AAT File No 2013380, Doc id 8187957

- 23-07-19 Departed Australia on GK 482 temporary skilled visa; and
 - 14-08-19 Arrived in Australia on GK 482 temporary skilled visa.
10. Ms Jade Kathleen McGrath (the primary visa holder) was granted a Temporary Work Skilled (UC 457) visa on 5 April 2017 based on the approved nomination as a Recruitment Consultant (ANZSCO 223112)⁴.
 11. On 4 February 2019 an application was made to add the applicant as a dependant on Ms McGrath's visa. On 11 February 2019 the applicant was subsequently granted a Temporary Skilled Shortage (GK 482) visa on the basis that he was a member of Ms McGrath's family unit as they were in a genuine and continuing relationship⁵.
 12. On 17 March 2020 the Department of Home Affairs (the Department) received a 'Form 1022 - Notification of changes in circumstances' from Ms McGrath's advising she was no longer in a de-facto relationship nor living with the applicant, and thus requested he be removed as a dependant from her visa⁶.
 13. On 22 June 2020 the Department emailed the applicant a Notice of Intention to Consider Cancellation (NOICC)⁷ as they had received information to indicate he was no longer a member of Ms McGrath's family unit and as such, the circumstance which initially permitted the grant of his visa no longer existed. The Department did not receive a response to this NOICC from the applicant.
 14. On 25 August 2020 the Department cancelled the applicant's Temporary Skilled Shortage (GK 482) visa on the basis that he ceased to be in an ongoing relationship with Jade, and thus ceased to be either Jade's spouse or a de-facto partner as defined respectively by ss.5F and 5CB of the Act⁸.
 15. On 29 August 2020 the applicant lodged an application for review in respect of this decision to cancel his visa resulting in this AAT case number 2013380.
 16. *Documents*
 17. The applicant's email to the Department dated 26 August 2020 advised he wished to appeal the delegate's decision as he is working towards obtaining permanent residency having established a life in Australia and that he will experience social and financial hardship if his visa is cancelled and / or forced to depart Australia.⁹
 18. The applicant submitted the following material to the Tribunal:
 - (a) Copy of NOICC dated 22 June 2020, notification letter dated 26 August 2020¹⁰ and primary decision record dated 25 August 2020;¹¹
 - (b) Applicant's undated statement lodged to Tribunal on 29 August 2020 advising he wishes to appeal the delegate's decision as he is working towards obtaining permanent residency thus has established a life in Australia and will experience social and financial hardship if his visa is cancelled and / or forced to depart;¹²
 - (c) Legal submissions by Lawson Bayly dated 29 March 2021 conceding grounds for cancellation exist and detailing discretionary factors for consideration such as

⁴Department of Home Affairs - Integrated Client Services Environment (ICSE) records

⁵Ibid

⁶ Form 1022, Department File Number BCC2020/1240168, Doc Id No: 7614384

⁷NOICC dated 22 June 2020, Department File Number BCC2020/1240168, Doc ID No: 7614391

⁸ Primary decision record dated 25 August 2020, Department File Number BCC2020/1240168, Doc ID No: 7614397

⁹ Applicant statement to Department dated 26 August 2020, Department File Number BCC2020/1240168, Doc Id No: 7614399

¹⁰NOICC and notification letter, Tribunal Case file 2013380, Doc ID No: 7607337

¹¹ Primary decision record dated 25 August 2020, Tribunal Case file 2013380, Doc ID No: 826119

¹² Applicant undated statement to Tribunal, Tribunal Case file 2013380, Doc Id No: 7602245

applicant's wellbeing, legal consequences for the applicant's proposed partner visa application, and how the applicant's skills and future employability are benefits to the Australian community;¹³

- (d) Applicant's statement dated 24 March 2021;¹⁴
- (e) Statement by Ms Ashlea McPhie dated 24 March 2021;¹⁵
- (f) Applicant's Temporary Skill Shortage (GK 482) visa grant notice dated 11 February 2021;¹⁶
- (g) Applicant's Bridging Visa E (WE 050) visa grant notice dated 16 October 2020;¹⁷
- (h) Photographs of the applicant with Ashlea and various other friends and relatives;¹⁸
- (i) Applicant's Young Apprentice in Construction from Construction Skills dated June 2010;¹⁹
- (j) Applicant's Level 2 Certificate in Electrotechnical Technology from City & Guilds London dated 20 September 2011 and history of academic modules;²⁰
- (k) Applicant's AM2 Certificate of Electrotechnical Occupational Competence from NET dated 22 April 2013;²¹
- (l) Applicant's Level 3 Certificate in Electrotechnical Technology from City & Guilds dated 13 June 2013 and history of academic modules;²²
- (m) Applicant's Level 3 NVQ Diploma in Installing Electrotechnical Systems and Equipment from City & Guilds dated 31 July 2013 and history of academic modules;²³ and
- (n) Applicant's Advanced Level Apprenticeship Electrician Installation in the Building Services Engineering Sector from Summit Skills dated 30 August 2013.²⁴

Does the ground for cancellation exist?

s.116(1)(a) - Circumstances permitting grant no longer exist

- 19. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied the circumstances which permitted the grant of the visa no longer exist.
- 20. The applicant was granted a Temporary Skilled Shortage (GK 482) visa because he met the secondary criteria as family member of Ms McGrath's as prescribed pursuant to r.1.12 of the *Migration Regulations 1994* ('the Regulations'). To remain a member of Ms McGrath's family unit it was necessary for the applicant to continue to be either Ms McGrath's spouse or de facto partner as defined by ss.5F and 5CB of the Act respectively.

¹³Legal submissions by Lawson Bayly dated 29 March 2021, Tribunal Case file 2013380, Doc ID No: 8258384

¹⁴Applicant statement dated 24 March 2021, Tribunal Case file 2013380, Doc ID No: 8258384

¹⁵Statement by Ashlea McPhie dated 24 March 2021, Tribunal Case file 2013380, Doc ID No: 8258384

¹⁶Tribunal Case file 2013380, Doc ID No: 8258384

¹⁷Ibid

¹⁸Ibid

¹⁹Ibid

²⁰Ibid

²¹Ibid

²²Ibid

²³Ibid

²⁴Ibid

21. By a Notice of Change of Circumstances dated 12 March 2020, pursuant to s. 104 of the Act, Ms McGrath informed the Department that she and the applicant were no longer in a de-facto relationship and no longer living together. The applicant's email to the Department dated 26 August 2020²⁵ confirmed that the applicant and Ms McGrath had separated and were no longer in a relationship.
22. On 22 June 2020 the Department forwarded to the applicant a Notice of Intention to Consider Cancellation (NOICC) of the applicant's visa pursuant to s.116(1)(a) of the Act on the basis that he was no longer a de facto partner or a spouse of Ms McGrath. The NOICC advised that the applicant was to respond to the NOICC in writing within five days for the day upon which he was taken to have received the NOICC. No correspondence was received by the Department from the applicant in response to the NOICC.
23. On 25 August 2020 the delegate found that there were grounds to cancel the applicant's visa pursuant to s.116(1)(a) of the Act by reason that he had ceased to be a member of a family unit prescribed by reg 1.12(2)(a). The applicant, by his submission to the Tribunal dated 29 March 2021 concedes that the grounds for cancellation of his visa do exist.
24. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

25. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
26. While the applicant has conceded that the grounds for cancellation exist, he urged the Tribunal to exercise its discretion not to cancel the visa on the following basis:²⁶
 - (a) The well-being of the applicant's current de-facto partner, Ms Ashlea McPhie;
 - (b) The legal consequences of a decision not to set aside the cancellation will be onerous for both the applicant and Ms McPhie; and
 - (c) The applicant is a qualified electrician.
27. *The well-being of the applicant's current de-facto partner*
28. The applicant submits that he intends to apply for an onshore Partner visa with Ms McPhie. He claims that he is intimately connected to his ongoing presence in Australia and the cancellation of his visa is likely to cause significant hardship to the applicant and Ms McPhie..
29. In the applicant's email dated 26 August 2020 he states that he had decided that Australia was the place he would 'love to settle down.' He claimed that if his visa was cancelled, he would be devastated as he enjoyed the 'Australia way of life' having made many friends and a large support network. However, in his statement dated 24 March 2021²⁷ the applicant notes that after the end of his relationship with Ms McGrath he was aware that he would no longer be eligible for the visa. He states that he believed that he did not need to take any further action in relation to his visa as he was intending to travel to New Zealand and Canada on a working holiday visa. However, due to Covid-19 he states that he was not able to complete his travel plans. He claims

²⁵Applicants email to the Department dated 26 August 2020

²⁶Applicants submission to the Tribunal dated 29 March 2021; Tribunal Case file 2013380, Doc ID No: 8258384

²⁷Op Cit @ para 8-10.

that the pandemic was worse in the United Kingdom and as a result he decided that he was better off staying in Australia.

30. The applicant and Ms McPhie both claim they met in St Kilda and developed a relationship in or about October 2020. The applicant claims that the reason he wishes to remain in Australia is so he can continue his life that he and Ms McPhie 'have built together over the past six months.'²⁸ The applicant claims that he and Ms McPhie have applied to register their relationship with Births, Deaths and Marriages Victoria and that they now hope to make an application for a partner visa. The applicant did not provide any evidence of his relationship having made to Births, Deaths and Marriages Victoria as claimed.
31. Ms McPhie claims that prior to meeting the applicant she had been through a difficult time. Her evidence was that up until the end of 2019 she had been employed in 'blue-collar' recruitment. In or about August 2019 she purchased her first home, a one-bedroom apartment in Moonee Ponds, Victoria and took possession of the property in or about December 2019. Toward the end of 2019 Ms McPhie left her job and took on a new position in IT recruitment. In or about March 2020 due to the Covid-19 pandemic her position was terminated.
32. Her evidence²⁹ was that it was 'incredibly hard for her to deal' with the first lockdown of the pandemic in circumstances where she had lost her first job and the feeling of social isolation associated with the first lockdown of the pandemic. She claims it was 'probably the worst time' of her life.³⁰
33. Ms McPhie claims that she has previously experienced minor episodes of depression in her life but nothing that she went through in 2020. Her evidence was that after losing her job she began drinking heavily. She claims that she blacked out on a few occasions and could not recall where she had been or what she had done. She states that on one occasion she left her apartment to buy cigarettes, when she woke up the next morning, she was not able to locate her keys or wallet and could not recall how she got home.³¹ In or about July 2020 Ms McPhie claims that she called her father who was traveling in Mildura at the time. As a result of the call her parents came back to Melbourne and the applicant stayed at their home for a period of approximately 6 weeks.
34. Ms McPhie's evidence was that by mid-August she hadn't consumed alcohol or cigarettes for approximately one month.³² As a result she felt well enough to return to her apartment. At that time lockdown had eased, she had found casual work and she was spending time with her friends. It was through one of her friends that she met the applicant. The applicant and Ms McPhie have been living together since November 2020. The applicant provided photos which showed the applicant and Ms McPhie in various domestic situations as evidence of their relationship. She described the prospect of the applicant having to leave Australia as 'devastating'.³³
35. Ms McPhie's father (Mr Russel McPhie) and brother (Mr Ryan McPhie) both confirmed that the applicant and Ms McPhie are in a relationship. They gave evidence to the effect that Ms McPhie had been drinking heavily during the covid-19 lockdown and had suffered a series of mental 'melt downs.' Their evidence was that the applicant had been a great support to Ms McPhie and that he had been a positive influence on her mental condition and general wellbeing. They stated that her condition had improved

²⁸Op Cit @ para 12

²⁹Statement of Ashlea McPhie dated 24 March 2021. Tribunal Case file 2013380, Doc ID No: 8258384.

³⁰Ibid

³¹Op Cit @ para 9

³²Op Cit @ para 13

³³Op Cit @ para 21

since being with the applicant. They feared that if the applicant's visa was cancelled and he was forced to leave the country her condition would deteriorate once again.

36. Ms McPhie's evidence was that she had not consulted any medical practitioner (such as a psychologist) about her mental condition or in relation to her consumption of alcohol. Instead, her evidence was that she had consulted a life coach, known as Vicky, 'a few times between June and October 2020.'³⁴ Life coaching³⁵ is described as a future-oriented therapy focused on achieving goals. It is claimed that life coaches help people to clarify their goals, identify any obstacles, and develop strategies to overcome each obstacle.³⁶ That is, they do not treat people for any underlying mental issue, but merely assist people to achieve their goals. It was not entirely clear to the Tribunal how the life coach was to deal with any mental issue she claims to have suffered. Ms McPhie was not able to say how many episodes she had suffered or the frequency of such events, save to say that she claims that she had a meltdown often. In addition, Ms McPhie's father and brother were not able to say precisely how many 'meltdowns' she had suffered. In any event, Ms McPhie was not able to provide the Tribunal with any medical report or a report from her life coach in relation to her condition. While Ms McPhie was emotional during the hearing, in the absence of any such report the Tribunal is not able to make any finding in relation to her condition.
37. Nevertheless, the Tribunal notes that Ms McPhie's evidence was that prior to her meeting the applicant, in about mid-August 2020, she had started to feel better. She had stopped drinking, lockdown had ceased, she was working again and seeing friends. The Tribunal accepts that the combination of being in lockdown and heavy drinking would have had detrimental effect on Ms McPhie's mental health. While the Tribunal accepts that being in a relationship with the applicant may have helped improve her mental condition, in circumstances where it appears she was already recovering from her episodes and in the absence of any medical report, the Tribunal is not in a position to determine to what extent her relationship with the applicant has helped improve her mental condition. The Tribunal notes the period the applicant and Ms McPhie have been in a relationship has been a relatively short and commenced in circumstances where the applicant's visa had been cancelled.
38. Nevertheless, the Tribunal accepts that the applicant and Ms McPhie are in a relationship as claimed. As a result, the Tribunal accepts there would be some hardship suffered by the applicant and Ms McPhie if the applicant's visa was cancelled, and he was required to return to the United Kingdom. The Tribunal places some weight on this consideration in the applicant's favour.
39. *The legal consequences of a decision to affirm the delegates decision to cancel the visa*
40. The applicant claims that the legal consequences of a decision not to set aside the cancellation will be onerous for both the applicant and Ms McPhie. The applicant submits that it is his intention to apply for a further application for an onshore Partner visa. He claims that this application will be hampered by the 'injudicious application' of the provisions of cl. 820.211(2)(d)(ii) of Schedule 2 of the Regulations.
41. Section 48 of the Act provides that:
- Non-citizen refused a visa or whose visa cancelled may only apply for particular visas***
- (1) A non-citizen in the migration zone who:*
- (a) does not hold a substantive visa; and*

³⁴Op Cit @ para 12

³⁵ www.kindlycutthecrap.com

³⁶ www.verywellmind.com/what-is-a-life-coach-4129726

(b) *after last entering Australia:*

- (i) *was refused a visa, other than a refusal of a bridging visa or a refusal under section 501, 501A or 501B, for which the non-citizen had applied (whether or not the application has been finally determined); or*
- (ii) *held a visa that was cancelled under section 109 (incorrect information), 116 (general power to cancel), 133A (Minister's personal powers to cancel visas on section 109 grounds), 133C (Minister's personal powers to cancel visas on section 116 grounds), 134 (business visas), 137J (student visas) or 137Q (regional sponsored employment visas); may, subject to the regulations, apply for a visa of a class prescribed for the purposes of this section or have an application for such a visa made on his or her behalf, but not for a visa of any other class.*

42. Regulation 2.12 provides a list of classes of visas that are prescribed under section 48 for citizens whose applications have been refused or visas cancelled in Australia. Under reg 2.12 Partner (Temporary) (Class UK) and Partner (residence) (Class BS) are prescribed visas under section 48. As such an application for a Partner visa can be made after the cancellation of a visa.

43. However, cl. 3001 of Schedule 3 of the Regulations states:

44. 3001

- (1) *The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).*
- (2) *For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:*

.....

(c) *if the applicant:*

- (i) *ceased to hold a substantive or criminal justice visa on or after 1 September 1994;*
 - (ii) *entered Australia unlawfully on or after 1 September 1994;*
- whichever is the later of:*
- (iii) *the last day when the applicant held a substantive or criminal justice visa; or*
 - (iv) *the day when the applicant last entered Australia unlawfully; or*

(d) *if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation--the later of:*

- 45. (i) *the day when that last substantive visa ceased to be in effect;*
and
- 46. (ii) *the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision*

47. Therefore, the applicant was required to make his further partner visa application within 28 days from the date on which his visa was cancelled. This date has now passed, and the applicant made no application.

48. In circumstances where the applicant's visa has been cancelled and the Tribunal affirms the delegate's decision to cancel the applicant's visa, pursuant to s.48 and

Reg. 2.12 the applicant would be able to make an application for a Partner visa but it must be refused by the Department pursuant to cl.3000 of schedule 3 of the Regulations by reason that it was not lodged within 28 days of the date on which the applicant's visa was cancelled.

49. However, in circumstances where the applicant's visa has been cancelled and the Tribunal makes a decision to set aside the delegate's decision, then pursuant to cl. 3001 of Schedule 3 of the Regulations, the applicant will be able to apply for a partner visa within 28 days from either the day on which his last substantive visa ceased to be in effect or the day on which he is taken to have been notified of the Tribunal decision. The applicant's visa expired on 5 April 2021. As such, he cannot make any application based on the date his last substantive visa ceased to be in effect. As such he will have 28 days from the date on which he is notified of the Tribunal's decision to set aside the cancellation of his visa.
50. The applicant submits that the Tribunal should exercise its discretion not to cancel the visa based on the hardship the applicant and Ms McPhie would suffer if it was cancelled. This would allow him an opportunity to make an application for a partner visa which would otherwise be denied him by operation of s.48 of the Act.
51. In addition, he submits that in exercising its discretion not to cancel the visa, the Tribunal should consider that if his visa is cancelled, he will be required to leave Australia to make an application for a partner visa. That is, he would have to return to the United Kingdom. The applicant submits he will suffer further hardship by returning to the United Kingdom by reason that:

- (a) There is a delay in the processing of partner visas offshore. The Department of Home Affairs³⁷ current estimates the processing time for partner visa applications is 24 months at a cost of approximately \$AUD 7,715.00. The applicant submits that this time is an excessive time to wait in circumstances where he could make the application onshore and continue his life in Australia with Ms McPhie. In addition, he claims that it would amount to excessive hardship given the restrictions in place in the United Kingdom due to Covid-19.

52. The Tribunal accepts that there is a delay in processing the partner visa offshore and that Covid-19 restrictions are in place in the United Kingdom (which were relaxed on 17 May 2021).³⁸ However, the Tribunal notes that it is possible for Ms McPhie and the applicant to travel to the United Kingdom for the purposes of making the application. Ms McPhie's apartment in Moonee Ponds is currently rented and she is not currently working on a fulltime basis. Despite, an exemption being required for Ms McPhie to depart Australia,³⁹ there is currently limited restrictions on the applicant and her traveling from Australia to the United Kingdom. Due to Covid-19 a person traveling from Australia to the United Kingdom, amongst other things, must have a negative COVID-19 test result before departure for the UK and undergo 10-day self-isolation on their arrival.⁴⁰ This period may be shortened if the person pays for a COVID-19 test after five days and receives a negative result.⁴¹ Nevertheless, the Tribunal accepts that there is a high degree of uncertainty in relation to current restrictions in traveling overseas and that the current pandemic has caused significant difficulties for people traveling to foreign and returning home to Australia. As a result, the Tribunal places great weight in the applicant's favour in relation to the delay in

³⁷ <http://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/partner-offshore>

³⁸ www.gov.uk/guidance/covid-19-coronavirus-restrictions-what-you-can-and-cannot-do

³⁹ www.smartraveller.gov.au/destinations/europe/united-kingdom

⁴⁰ Ibid; www.gov.uk/guidance/covid-19-coronavirus-restrictions-what-you-can-and-cannot-do

⁴¹ Ibid

processing a partner visa offshore and the Covid-19 restrictions currently in place in the United Kingdom and Australia.

53. (b) The applicant stated that if he does return home there are limited employment opportunities in his village in Kent, United Kingdom and that he would find it difficult to make the application for a partner visa in the United Kingdom. However, the Tribunal notes that the applicant is from Dover in Kent and is a qualified electrician in the United Kingdom. Dover is a coastal town with a population of approximately 30,000 located in Kent, England. It is a major port for ferries traveling to the coast of France and is within a 30-minute drive from town centres such as Canterbury, Margate, Ashford and Folkstone. The total population of Kent is approximately 1.7 million.⁴² While the Tribunal accepts that the economy in the United Kingdom has suffered as a result of the Covid-19 pandemic, it is reported that the economy of the United Kingdom is poised for recovery.⁴³ An internet search⁴⁴ by the Tribunal revealed many electrical jobs advertised in city centres in Kent within a short drive from Dover. As such the Tribunal does not accept the applicant's submission that he will not be able to find employment if he is returned to the United Kingdom. Accordingly, the Tribunal does not accept that the applicant will suffer significant financial hardship if he returns to the United Kingdom and as such places no weight on this consideration in the applicants favour. .
54. *The applicant is a qualified electrician in the United Kingdom*
55. The applicant is a qualified electrician in the United Kingdom. He claims that his skills as an electrician are a benefit to the community which should be considered for the purpose of the Tribunal exercising its discretion in favour of setting aside the decision to cancel his visa.
56. The Tribunal accepts that his skills as an electrician are a benefit to the community, however, it notes that he has made little effort to obtain his qualifications in Australia. . The applicant claims that he intends to obtain the necessary qualifications to become recognised in Australia if he is permitted to remain in Australia. His evidence to the Tribunal was that he had not obtained his qualifications in Australia due to the cost being approximately \$AUD15,000.00. The Tribunal notes however, that his evidence is that he is currently earning \$1500.00 per week as an Electrical Trade Assistant through a contractor at La Trobe University.⁴⁵ It therefore appears that he currently has the financial means to obtain the upgrade in his qualification. Nevertheless, the Tribunal gives some weight in favour of the applicant to in relation to his skills as an electrician.
57. *The purpose of the visa holder's travel and stay in Australia.*
58. The applicant initially came to Australia on a working holiday visa. He was subsequently granted a secondary visa on the basis that he was a member of a family unit of the primary holder Ms McGrath. On 17 March 2020 Ms McGrath advised the Department that she was no longer in a relationship with the applicant. This is not disputed by the applicant. As such, the basis of upon which the applicant was granted

⁴²Strategic Commissioning Statistical Bulletin (kent.gov.uk);

www.kent.gov.uk/__data/assets/pdf_file/0019/14725/Mid-year-population-estimates-age-and-gender.pdf

⁴³ The Guardian 'UK economy poised to recover after Covid-19 second wave.' 31 March 2021 by R.J.Partington; [www.theguardian.com/business/2021/mar/31/ UK-economy-poised-to-recover-after-covid-19-second wave](http://www.theguardian.com/business/2021/mar/31/UK-economy-poised-to-recover-after-covid-19-second-wave).

⁴⁴[www.totaljobs.com/jobs/Electrician/inKent?](http://www.totaljobs.com/jobs/Electrician/inKent?ef_id=EA1alQobChMIpeqh7JvD8AIVIKqWCh3zdgvgEAAAYBCAAEgKLxvDBwE:G:s&cid=SEA_GO__c__&s_kwcid=AL7101!3!513123928788!b!!g!!&WT.mc_id=A_SE_Google_TJ-SEC-CL3-12-DSA|Construction-and-Skilled-Trades_c_Electrician_513123928788_b)

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⁴⁵Applicants statement dated 24 March 20-21 @ para 4

the visa no longer exists. The Tribunal places significant weight on this fact in favour of affirming the delegate's decision to cancel the visa.

59. *The extent of compliance with visa conditions*

60. There is no evidence that the applicant has not complied with the conditions of the visa. As such the Tribunal places some weight in the applicant's favour in relation to this consideration.

61. *Degree of hardship that may be caused.*

62. The degree of hardship the applicant will suffer if the visa is cancelled is considered above. For the reasons expressed above the Tribunal accepts that there is a degree of hardship that both the applicant and Ms McPhie will suffer in the event that the visa is cancelled. The Tribunal gives some weight on this factor in favour of the applicant.

63. *The circumstances in which ground of cancellation arose.*

64. The cancellation of the applicant's visa arose as a result of the breakdown of his relationship with Ms McGrath. That is, he was no longer in a genuine and continuing relationship with her. As a result, the basis upon which he was granted the visa no longer exists. The Tribunal gives this factor significant weight in favour of affirming the delegate's decision to cancel the visa.

65. *Past and present behaviour of the visa holder towards the Department*

66. The applicant failed to respond to the NOICC. Nevertheless, there is no evidence of any adverse behaviour by the applicant towards the Department or the Tribunal. The Tribunal places little weight in favour of the applicant.

67. *Whether there would be consequential cancellations under s.140*

68. There is no evidence that indicate that the circumstances of this case are such that any person's visa would be cancelled under s.140 of the Act. The Tribunal gives no weight in favour or against the applicant in relation to that consideration.

69. *Any mandatory legal consequences*

70. The Tribunal refers to and repeats those matters referred to above in relation to the applicant's submissions concerning the legal consequences of a decision to affirm the delegate's decision to cancel the visa. The Tribunal gives some weight in favour of the applicant in relation to this consideration.

71. *Any international obligations*

72. There is no evidence before the Tribunal which indicates that cancellation of the visa in this case would result in any breach of Australia's international obligations. As such the Tribunal gives this consideration no weight.

73. *Any strong family, business or other ties in Australia*

74. The applicant submits that he is in a relationship with Ms McPhie, which has been accepted by the Tribunal. In addition, he claims that he has developed a relationship with Ms McPhie's family. The Tribunal notes that both Ms McPhie's father and brother both gave evidence in support of the applicant during the hearing. In addition, he has provided photographs of him and Ms McPhie at various family gatherings as an indication of the fact that he is involved with her family and friends. The Tribunal accepts that as a result of his relationship with Ms McPhie he has developed ties to her family. The Tribunal places some weight on this consideration in favour of the applicant.

75. *Other relevant matters*

76. There are no other factors relevant matter for consideration.

77. *Conclusion*

78. In making its decision the Tribunal has placed significant weight on the fact that the applicant's visa was cancelled because he was no longer in a relationship with Ms McGrath. That is, the basis for which he was granted the visa no longer exists. In circumstances where the applicant was aware that his visa had been cancelled, he did not reply to the NOICC and it was his intention to continue his travels to New Zealand and Canada, the Tribunal places significant weight on this consideration in favour of affirming the delegate's decision to cancel the applicant's visa.
79. However, these are extraordinary times and as a result the Tribunal has considered the applicant's circumstances considering the Covid-19 pandemic and the operation of s.48 of the Act, reg 2.12 and cl. 3001 of schedule 3 of the Regulations. In the normal course the Tribunal would be content to affirm the delegate's decision on the basis that the grounds for the visa no longer exist. However, the given extraordinary circumstances of the pandemic and the current restrictions on travel overseas and the operation of s.48 of the Act, the tribunal accepts that the applicant's opportunity in making a partner visa application are severally affected. The Tribunal is of the view that as a result of the Covid-19 pandemic he has lost the opportunity to make a Partner visa application. As such it is the denial of the opportunity for the applicant to make such an application which has caused him significant hardship. The Tribunal is of the view that he should not be denied the opportunity of making his application as claimed. As such it is of the Tribunal's view that the delegate's decision to cancel the visa should be set aside.
80. The applicant should be aware that the Tribunal has only marginally made its decision in the applicant's favour and does so without making any finding as to whether the applicant is in a genuine and continuous relationship for the purposes of his partner visa application.
81. Considering all the circumstances, the Tribunal concludes that the visa should not be cancelled.

DECISION

82. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa.

Jason Pennell
Senior Member